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No. 09-23

Supreme Court, U.S.
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In The

Supreme Court of the United States

RICHARD A. SMITH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Slodov v. United States*, 436 U.S. 238 (1978), this Court considered ancillary principles associated with 26 U.S.C. § 6672, without providing a bright line rule as to who is a responsible person for the non-payment of IRS payroll taxes. Following *Slodov*, there has been a great deal of litigation and several conflicting opinions associated with how this federal statute should be applied. The First and Ninth Circuits held initially that any person who had the *final word* regarding the payment or nonpayment of bills within a company was liable per se. Most of the remaining federal courts have flatly rejected this broad approach. In *Smith v. United States*, 555 F.3d 1158 (10th Cir. 2009), the United States Court of Appeals for the Tenth Circuit exacerbated this long-standing split of authority.

The Questions Presented are:

I. Whether the indicia associated with a nation-wide standard for the non-payment of payroll taxes pursuant to IRC § 6672 should provide a weight to the common law factors, with the most important factors pertaining to who had significant control over a business's finances.

II. Whether *Smith* has decided a jury instruction issue in a way that directly conflicts with this Court's rationale and result in *Estelle v. McGuire*, 502 U.S. 62 (1991).

PARTIES TO THE PROCEEDINGS

Mr. Richard Smith, former General Manager of now defunct, Woodruff Printing, Inc. and the United States of America.

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OPINION BELOW

On February 17, 2009, the United States Tenth Circuit considered Mr. Richard A. Smith's appeal. That decision is reported at *Smith v. United States*, 555 F.3d 1158 (10th Cir. 2009) (App. 1). A Petition for Rehearing was denied by the Tenth Circuit on April 3, 2009 (App. 38). The Memorandum Decision and Order Denying Mr. Smith's Motion for a New Trial was entered on August 28, 2007 (App. 31).

JURISDICTION

The Order of the United States Tenth Circuit, denying Mr. Smith's Petition for Rehearing, was entered on April 3, 2009. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). The basis for the Tenth Circuit's jurisdiction was Fed. R. App. P. 3(a)(1) and 28 U.S.C. § 1291.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

26 U.S.C. § 6672(a):

> Any person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the

> payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over. . . .

Amendment V: "No person shall . . . be deprived of . . . property without due process of law. . . ."

STATEMENT OF THE CASE

A. Factual Background

The facts associated with Mr. Richard A. Smith's assessment and judgment by the IRS are as follows.

After previously quitting in 2000, Mr. Smith returned to work for Woodruff Printing, Inc. in 2002 at the owners' request. The owners agreed to allow Mr. Smith to work for them under the title of "General Manager." However, the oldest son of the family and President of the company, Mark Woodruff, continued to remain the ultimate authority of this family owned and operated business. The Woodruff family barred Mr. Smith from firing family member, Brent Woodruff, as incompetent. The family also barred Mr. Smith from eliminating the annual salary of the founder, past President and majority shareholder, Rex Woodruff, in an amount of $80,000.00, to generate more cash for the company. Mr. Smith also had no control over Mark Woodruff printing jobs for his friends, which continually lost money. Only members of the Woodruff family were allowed to be shareholders and officers. Mr. Smith had limited

decision-making authority over business operations during the time the payroll taxes accrued.

Woodruff Printing did not do well in 2002, and closed its doors in 2003. It only had sufficient cash to pay for business operations during the time the taxes accrued. Mark and Rex Woodruff infused capital into the business to keep it operating by personally guaranteeing SBA loans, and putting their residences up for collateral during the time the taxes accrued. Mark Woodruff also signed all IRS tax returns, and signed an installment agreement with the IRS in 2003 to pay the back taxes. The Woodruff family rejected an offer to buy the company in 2003 (which would have paid the tax liability), because it meant that Mark and Rex Woodruff would have been fired.

Mr. Smith's responsibilities involved management of the accounting function for Woodruff Printing. He had limited check writing authority, in that he could only pay creditors of $5,000.00 or less unilaterally, or without further authorization. The tax liabilities were significantly higher than $5,000.00 as they accrued. Other persons at the business routinely signed Mr. Smith's name to checks. Mr. Smith, as General Manager, routinely discussed with Mark Woodruff as to which creditors should be paid first to keep the company operating. However, Mark Woodruff had the final word over which creditors to pay.

The IRS held Mr. Smith liable as a responsible person. He now owes approximately $345,000.00. Mr. Smith was not a shareholder, corporate officer, director,

nor could he hire and fire employees without Mr. Mark Woodruff's permission. Mr. Smith did not infuse capital into the corporation. Mr. Smith only had theoretical power to make IRS electronic transfers to pay the payroll taxes, because Mark Woodruff had decided how to spend the company's cash by prioritizing creditor payments. (App. 47-50).

B. Summary Legal Analysis

There has been a longstanding and evolving split in the circuits as to how to apply IRC § 6672. IRS statistics imply that the issue presented is important, because it has a potential effect on a large number of business employees. Since there is no national standard for liability, application of this statute has generated a multitude and variety of federal opinions. In *Smith v. United States*, 555 F.3d 1158 (10th Cir. 2009), the United States Tenth Circuit exacerbated the problem by ratifying jury instructions which greatly expand the number of employees who could potentially be held liable under IRC § 6672. A correct reading of *Smith* requires liability if an employee of a business simply has limited check writing authority, prepares payroll checks, prepares tax returns for a company, or has theoretically significant power over financial affairs.

Smith also materially diverges from the common law because it failed to weigh the common law indicia associated with liability in an objective manner.

Although *Smith* acknowledges that one of the jury instructions may have required liability for the disjunctive proposition that liability equates to mere check-writing authority, it held that the instructions, taken as a whole, correctly stated the law. However, *Smith* failed to correctly apply *Estelle v. McGuire*, 502 U.S. 62 (1991), decision, which requires jury instructions collectively to consider the evidence in a fair manner.

REASONS FOR GRANTING THE PETITION

I. *SMITH* DOES NOT COMPORT WITH THE FEDERAL COMMON LAW IN ITS APPLICATION OF IRC § 6672.

A. The Positions of the Circuits Have Evolved Over Time, and Remain Inconsistent in Their Respective Approaches.

In *Caterino v. United States*, 794 F.2d 1, 5 (1st Cir. 1986), the First Circuit held that liability arises under IRC § 6672, when either one of two disjunctive conditions occur: (1) when a "person ha[s] the power to determine whether the taxes should be remitted or paid, or (2) [when a person has] 'the *final word* as to what bills should or should not be paid and when" (hereinafter referred to as the "final word doctrine"). The final word doctrine ostensibly assumes that normally more than one person may discuss whether to pay vendors to stay in business or to pay accruing tax liabilities. The final word doctrine presumably was designed to shield subordinates from ill-advised

actions taken by their superiors. *See Salzillo v. United States*, 66 Fed. Cl. 23, 36 (2005). The First Circuit elaborated on the final word doctrine by stating that it meant having "significant rather than exclusive control over the disbursement of funds." *Id.*

Although apparently modifying their positions somewhat to adapt to the ever evolving case law of the other circuits, the First and Ninth Circuits still adhere to the general premise associated with the final word doctrine. Indeed, the final word doctrine has never been explicitly overturned by either of these circuits; rather, it is still routinely considered as the material factor for determining liability. *See Vinick v. United States*, 205 F.3d 1, 9, 13 (1st Cir. 2000), *citing*, *Caterino*, 504 F.2d at 5; *Jean v. United States*, 396 F.3d 449, 454 (1st Cir. 2005); *Purcell v. United States*, 1 F.3d 932, 936-37 (9th Cir. 1993).

The Fifth Circuit and the Court of Claims initially took an intermediate position regarding the final word doctrine. While acknowledging that a totality of circumstances approach is warranted in determining liability generally, it adhered to the notion that a person is responsible if he or she had a "final or significant – even if not exclusive – word as to which bills or creditors should be paid." *Commonwealth National Bank of Dallas v. United States*, 665 F.2d 743, 757 (5th Cir. 1982); *White v. United States*, 372 F.2d 513 (Ct. Cl. 1967). The Fifth Circuit has subsequently modified its position to conform to the other circuits. However, the Federal Court of Claims has recently held explicitly that theoretically significant

financial power is not a basis for responsibility. *See Salzillo v. United States*, 66 Fed. Cl. 23 (2005). The Federal Circuit has held long ago that liability equates to any person with ultimate authority over the expenditure of funds. *Godfrey v. United States*, 748 F.2d 1568, 1575 (Fed. Cir. 1984).

B. The Remaining Circuits Have Explicitly Rejected the Final Word Doctrine and Use a Different Approach.

The rest of the Circuits have explicitly rejected the final word doctrine, and only use the "significant financial authority" and "application of salient indicia" approach. *See, e.g., Winter v. United States*, 196 F.3d 339, 345 (2nd Cir. 1999); *Greenberg v. United States*, 46 F.3d 239, 243 (3rd Cir. 1994); *Barnett v. Internal Revenue Service*, 988 F.2d 1449, 1455 (5th Cir. 1993); *Jefferson v. United States*, 546 F.3d 477, 480 (7th Cir. 2008); *Cline v. United States*, 999 F.2d 539 (6th Cir. 1993); and *Taylor v. Internal Revenue Service*, 69 F.3d 411, 416 (10th Cir. 1995). The significant financial authority approach considers a person's status, duty and authority within a company, rather than giving undue weight to a person's ability to have the final word as to which creditors to pay. *See, e.g., Greenberg*, 46 F.3d at 243.

The Seventh Circuit, although explicitly rejecting the final word doctrine, adheres to the notion that the power to prefer payment to creditors over the IRS is

the primary factor for liability. *Jefferson*, 546 F.3d at 480.

The significant financial authority approach requires consideration of a variety of indicia to determine who had sufficient power within a business to see that the taxes were paid. However, the indicia used and the weight given to specific indicia varies, thus, creating a second, material split in the circuits. For example, in the First, Second, and Fifth Circuits, the factors for liability include whether a person: (1) was an officer, director, or shareholder; (2) was active in managing the company's day-to-day activities; (3) had the ability to hire and fire employees; (4) made decisions regarding which, when and in what order outstanding debts or taxes would be paid; (5) had the ability to exercise control over daily bank accounts and disbursement; and, (6) had check-writing authority. *See, e.g., Winter v. United States*, 196 F.3d at 345.

However, in the Third Circuit the indicia for liability require analysis of the contents of the corporate bylaws, a person's ability to sign tax returns, and a person's explicit ability to pay creditors *other than the United States*. *Greenberg,* 46 F.3d at 243. The Tenth Circuit's indicia also vary from those used by the other circuits. Among other things, the Tenth Circuit considers whether a person has infused capital into the company to keep it afloat. *Denbo v. United States*, 988 F.2d 1029, 1032 (10th Cir. 1993). The Tenth Circuit also flatly rejects the final word doctrine, while being the only circuit which explicitly requires the conjunctive indicia of having significant

management and financial control for liability. *Taylor*, 69 F.3d at 415-16. The other circuits focus primarily on financial control.

The Sixth and Ninth Circuits do not use the indicia standard at all. *Cline v. United States*, 999 F.2d 539 (6th Cir. 1993); *Purcell,* 1 F.3d at 936-37. However, like the First, Seventh and Ninth Circuits, the Sixth Circuit recognizes that the determination of priorities for creditor payments is the most important factor as to whether a person has significant control over a company's finances – despite following the Second, Third, Fifth and Tenth Circuits, in flatly rejecting the final word standard as disjunctive liability per se. *Cline v. United States*, 999 F.2d 539 (6th Cir. 1993). The Ninth Circuit, while adhering to the final word doctrine, also considers one's status, duty and authority within the corporation (as do the First and Third Circuits). *Purcell v. United States*, 1 F.3d at 936-37; *Vinick*, 205 F.3d at 8; *Greenberg*, 46 F.3d at 243. Thus, the Federal, First, Sixth, Seventh, Ninth Circuits and the Federal Court of Claims seem to still follow more closely the final word doctrine, by giving significantly more weight to the indicium of which person had the significant say as to which creditors should be paid in lieu of paying the taxes.

C. *Smith* Is in Direct Conflict With Other Federal Courts in its Application of IRC § 6672.

As one would expect, application of these varying standards has resulted in courts applying IRC § 6672 in opposite ways under similar facts. For example in *Vinick*, despite owning ⅓ of the company stock, personally guaranteeing an SBA loan, being the corporate Treasurer, negotiating a payment plan for back taxes with the IRS, collecting financial information to prepare corporate tax returns, helping to negotiate a loan for the corporation, and signing corporate checks, i.e., all indicia of responsibility, the taxpayer was found not to be a responsible person by the First Circuit in the year 2000. The reason given was that the taxpayer did not have sufficient financial control over business operations to see that the taxes were paid, whereas others did. *Vinick*, 205 F.3d at 14.

In weighing the indicia, *Vinick* stated that titular authority or position within a business meant little in terms of responsibility. *Id.* at 11. *Vinick* also gave the greatest weight to the indicia associated with having financial control over a business, e.g., having the final or a significant word as to creditor payment. *Id.* at 9. *Vinick* also gave the factors associated with corporate status and daily involvement in daily operations less weight. *Id.* at 9-14. Indeed, *Vinick*, in citing to *Godfrey*, held that even a person who was very actively engaged in the day-to-day operations of an organization may not be responsible, depending upon his ability to pay the taxes. *Id.* at 12, *citing*, *Godfrey*, 748 at 1576.

Id. (where the Federal Circuit held that even taking the lead in a company's insolvency proceedings, negotiating loans and a recapitalization plan, helping to arrange for the sale of corporate assets, being the Chairman of the board and participating in the hiring and firing employees did not equate to responsibility). Thus, *Vinick* and *Godfrey* hold that although the weighing of all indicia is necessary under a totality of circumstances approach, the most important factors have to do with who had control over a business's money – not necessarily those associated with day-to-day management and check-writing authority.

However, in *Smith*, the Tenth Circuit weighed the common law indicia for responsibility very differently. That is, despite not being a corporate officer, shareholder, or director in a family owned, closely-held corporation, despite not negotiating an installment agreement with the IRS for back taxes (as the Corporate President did), despite having limited check writing authority, despite not having the final word as to which creditors were to be paid in this cashed strapped company, despite not signing any tax returns, despite not infusing capital into the company (as two other corporate officers did), despite not being involved in the decision to keep the business operating (rather than trying to sell it and paying the taxes), and despite not being able to hire and fire or in any way restrict Woodruff family members, Mr. Smith was found liable pursuant to IRC § 6672, due to his position as a General Manager, his knowledge of the accruing liability, his check writing capacity to pay

smaller creditors, and his theoretical authority to make electronic transfers to the IRS (despite indisputable evidence that the corporate president had made such power ephemeral by prioritizing creditor payments).[1] *Smith*, 555 F.3d at 1161-62. (App. 47-49).

Smith's holding is in direct conflict with *Vinick*, *Godfrey* and *Salzillo* for the following reasons. Essentially, *Smith* weighed status and involvement in day-to-day activities far more heavily than the First and Federal Circuits have. In so doing, the Tenth Circuit tried to fit a round peg into a square whole by short shifting the heart of the matter associated with determining liability under IRC § 6672, i.e., finding out who had control over the business's money. *Vinick*, 205 F.3d at 9-10. In *Vinick*, the First Circuit held that the ability to merely participate in managerial decisions was insufficient for responsibility. *Vinick*, 205 F.3d at 14. It also held that the ability to significantly control financial operations is what is dispositive for responsibility. *Id.* This approach is identical to that of nearly all other federal courts. *See, e.g., Godfrey*, 748 F.2d at 1575. *Vinick* in citing to *Godfrey* also stands for the principle that day-to-day operational authority need

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[1] *Smith* also incorrectly places importance on the fact that Richard Smith knew that the taxes were accruing, while other circuits have held that knowledge is an immaterial factor for responsibility, and only relates to willfulness. *Smith*, 555 F.3d at 1164; *Greenberg*, 46 F.3d at 243; *Godfrey v. United States*, 748 F.2d 1568, 1576 (Fed. Cir. 1984).

not equate to responsibility. *Vinick*, 205 F.3d at 12, *citing*, *Godfrey*, 748 F.2d at 1576. Indeed, *Godfrey* stands for the principle that responsibility requires an analysis of substance over form, and whether a person possessed the "power to compel or prohibit the allocation of corporate funds." *Id.* In *Godfrey*, a Board of Director who became the "single most important individual directing the business affairs of the corporation" was held not responsible, because there was no "evidence that Godfrey had or exercised control of the collection, accounting for and payment" of the taxes. *Id.*

However, in *Smith*, the Tenth Circuit focused on the fact that Mr. Smith was involved in day-to-day affairs, had some check writing authority and had the theoretical power to pay taxes by electronic funds transfer – despite also finding that the company had insufficient funds to pay the taxes, and that it was Mark Woodruff who had the final say as to which creditors were to be paid to keep the business operational. *Smith*, 555 F.3d 1161-62, 1164-65. Thus, *Smith* provided far greater weight to indicia which are not considered that important by the Federal and First Circuits. *Smith* also is in direct conflict with the final or significant word doctrines, and the rest of the federal courts, which place significant weight on the indicium pertaining to who controlled the money in a business.

A superficial reading of *Smith* may lead one to the conclusion that the Tenth's Circuit's focus on Mr. Smith's theoretical ability to make electronic transfers

to pay the IRS jived with the common law requirement for having significant control over business finances. However, it is clear that this approach is materially flawed. In *Smith*, the Tenth Circuit also found that Mark Woodruff had the final word as to the payment of creditors, and that his focus was to keep the business operational rather than to pay the taxes. Thus, Mr. Smith's ability to pay the taxes was only theoretical, because there never was any money available to make an electronic fund transfer.

The Court of Appeals in *Salzillo* dealt with a nearly identical issue. In *Salzillo*, the Federal Court of Claims held that a Chief Financial Officer with theoretical power to pay payroll taxes was not liable under IRC § 6672, because his boss had the final word over creditor disbursement. *Salzillo*, 66 Fed. Cl. at 36. Thus, *Smith* also directly conflicts with this opinion in the Federal Court of Claims.

Additionally, it appears that *Smith* applied the indicia standard in a result oriented way, rather than weighing all indicia objectively, and as the common law requires. Indeed, *Smith* placed importance on the fact that despite evidence that Mr. Smith could only write checks for amounts under $5,000.00, he wrote a "substantial number" of checks over $5,000.00. *Smith*, 555 F.3d 1164. The implication was that Mr. Smith had sufficient financial power to pay the taxes. However, *Smith* neglects to mention that the evidence showed that most, if not all of the amounts of those checks were for far less than the actual amount required to pay the payroll taxes, that they were

written within weeks of the company failing, and in relation to the hundreds of other checks IRS had provided, were relatively few in number. The decision also fails to mention that persons at the business routinely signed Mr. Smith's name to the checks placed in evidence by the government. (App. 52-53). Consequently, it is apparent that the Tenth Circuit weighed this check-writing fact in a non-objective and conflicting manner to the other circuits.

Smith also weighed other indicia in a manner that is incongruous to the federal common law. For example, *Smith* does not address the fact that a prospective buyer, Drew Elkins, would have paid the taxes in 2003, but it would have meant that family members Mark and Rex Woodruff would have been fired, so the Woodruff family rejected the offer. (App. 51-52; *Smith*, 555 F.3d at 1162). This fact explicitly conflicts with *Godfrey*, 748 F.2d at 1576. *Smith* also ignored the fact that Mark Woodruff received a large payment from corporate funds shortly before the company went out of business, and was implicitly controlling the disbursement of funds for the business. The opinion also ignored the fact that Mr. Smith wanted to eliminate Rex Woodruff's annual salary of $80,000.00, but was barred from doing so by the Woodruff family. (App. 50-51). The opinion also ignored the fact that Mr. Smith wanted to fire Brent Woodruff as an incompetent, but was barred from doing so by the Woodruff family. (App. 50). This fact also explicitly conflicts with *Godfrey*. *Id.* The opinion also ignored the fact that Mr. Smith could not bar Mark Woodruff from

printing jobs for his friends which lost money for the company.

In sum, it is apparent that the Tenth Circuit in *Smith* only weighed the indicia it wanted to reach a result, rather than weighing the evidence objectively, and as required by the common law. Most importantly, though, is the fact that *Smith* is a case where a federal court for the first time placed greater weight on relatively less important and theoretical power to find liability, rather than focusing on who controlled a business's money. It thus stands as a complete contradiction to the holdings of all federal courts on this issue.

II. *SMITH*'S APPLICATION OF THE JURY INSTRUCTIONS MATERIALLY EXACERBATED THE SPLIT IN THE CIRCUITS AND CONFLICTS WITH THIS COURT'S *ESTELLE* DECISION.

In *Smith*, the Tenth Circuit ratified a jury instruction, i.e., No. 20, which required liability for a person who merely had the ministerial and disjunctive authority to pay creditors in smaller amounts, rather than focusing on a person's overall power to prioritize payment of creditors to see that the taxes were paid. *Smith*, 555 F.3d at 1166. (App. 39). This position materially diverges from the federal common law, which not only requires a significant degree of financial control over business operations to be liable, but eschews mere check writing as a sole basis for

liability. *See, e.g., Godfrey*, 748 F.2d at 1575; *Vinick*, 205 F.3d at 10.

The Tenth Circuit, ostensibly aware of the stated problem with Jury Instruction No. 20, concluded that Jury Instruction No. 21 fixed it by requiring liability also, if the jury found the general proposition that Mr. Smith had significant authority in both management and fiscal decision-making as an employee of Woodruff Printing. *Smith*, 555 F.3d at 1167; App. 40. However, this position does not comport with this Court's decision in *Estelle v. McGuire*, 502 U.S. 62 (1991) for the following reasons.

In *Estelle* this Court held that whether jury instructions fairly charged the jury is a question of whether there is a reasonable likelihood that the instructions, taken as a whole, along with the record, violated the Constitution. *Id.* at 72. In *Estelle* this Court held that a particular jury instruction did not deny the petitioner a fair trial, because it seemed more likely that the jury understood the instruction in the context of the other instructions, and as applied to the evidence. *Id.* at 74-75.

That cannot be said for the collective instructions here. *Smith* holds that because Jury Instruction No. 21 merely stated a general principle, i.e., that liability exists when a person has significant authority in the general management and fiscal decision-making of a business, the instruction sufficiently clarified any "ambiguity" in Jury Instruction No. 20. *Smith*, 555 F.3d at 1167. However, Jury Instruction No. 21 did

not connect or explain how a finding of fact that Mr. Smith had the disjunctive power of limited check writing authority related to the stated general principle. Indeed, it is far more likely that the jury would have inferred that a person who possessed the disjunctive power to unilaterally write a check for $5,000.00 to any creditor possessed sufficient power in management and finances to be liable. Thus, *Smith* not only misapplies *Estelle*, it is a direct contradiction to the notion that liability is a fact intensive inquiry, which requires an objective weighing of all of the evidence to arrive at the conclusion that a person had significant power within a business to pay the taxes. Such a position violates due process.

The *Smith* instructions raise two additional due process concerns as well. In *Smith*, the Tenth Circuit deemed it immaterial that the District Court refused to provide Mr. Smith's jury instruction for the infusion of capital, as required by Tenth Circuit precedent and the evidence. *Smith*, 555 F.3d at 1170; *Denbo*, 988 F.2d at 1003. Additionally, Jury Instruction No. 21 clearly minimized the importance of having the final word over the payment of creditors in determining who had significant financial control over business operations, and is in direct contradiction to the authorities cited. A jury's failure to weigh material facts correctly because of a jury instruction violates due process. Indeed, at a minimum, *Estelle* requires that the jury consider all material evidence correctly in light of the collective instructions. *Estelle*, 502 U.S. at 74.

III. IRS STATISTICS IMPLY THAT RESOLUTION OF THIS SPLIT IS IMPORTANT.

As the statistics presented in the IRS's "Data Book" for 2008 indicate, employment taxes generate over 32% of the nation's revenue. *See* www.irs.gov. This meant that resolution of the IRC § 6672 issue is important, because it has the potential to affect a large number of business employees annually. As the IRS Data Book also indicates, voluntary compliance with the nation's tax system is getting worse, rather than getting better. To promote taxpayer confidence in the administration of our tax laws, it would seem prudent, as a matter of public policy, that this Court insure that a federal statute, which has and will continue to arbitrarily impact thousands of business employees' lives throughout the country, be administered in a fair and precise manner.

CONCLUSION

The application of IRC § 6672 by the Federal courts has evolved over the past several decades into a disjointed patchwork of varied and conflicting legal principles. The most recent result is *Smith* – an arbitrary and result oriented decision, which has resulted in the disparate treatment of a citizen based upon the location of his home. *Smith* materially contradicts the Federal common law indicia standard generally, and the holdings of the Federal, First Circuit and Federal Court of Claims explicitly. *Smith*

also unfairly expands prospective liability to a greater number of business employees. Public policy concerns also suggest that the time is right to invigorate public confidence in the administration of our tax laws. The issue is important because it has the potential to impact a large number of business employees annually. Guidance by this Court to the circuits is long overdue as to who is a responsible person under IRC § 6672. Due process and respect for this Court's decision require that the Tenth Circuit's application of *Smith*'s collective jury instructions conform with this Court's holding in *Estelle*. For these reasons, Mr. Smith's Petition for Certiorari should be granted.

RESPECTFULLY SUBMITTED this 30th day of June, 2009.

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PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

RICHARD A. SMITH,

Plaintiff-Counter-Defendant-Appellant,

v.

UNITED STATES OF AMERICA,

Defendant-Counter Claimant-Appellee.

No. 07-4210

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH
(D.C. No. 2:05-CV-418-TS)

(Filed Feb. 17, 2009)

Theodore R. Weckel, Attorney, Salt Lake City, Utah, for Plaintiff-Counter-Defendant-Appellant.

Teresa T. Milton, Attorney, Tax Division, (Nathan J. Hochman, Assistant Attorney General, and Teresa E. McLaughlin, Attorney, Tax Division, with her on the brief) United States Department of Justice, Washington, D.C., for Defendant-Counter-Claimant-Appellee.

Before **HENRY**, **BRISCOE**, and **LUCERO**, Circuit Judges.

BRISCOE, Circuit Judge.

Plaintiff-Appellant Richard A. Smith filed a complaint in the district court pursuant to 28 U.S.C. § 1346(a)(1), seeking a refund of amounts paid in partial satisfaction of Internal Revenue Service ("IRS") assessments. Smith alleged the assessments were erroneously and illegally made because he was not a "responsible person" as defined by 26 U.S.C. § 6672. Defendant-Appellee United States filed an answer and counterclaim for amounts still owed. The case proceeded to jury trial. At the close of his presentation of evidence, Smith moved for judgment as a matter of law, which the district court denied after all the evidence had been presented. After a jury verdict for the United States, Smith moved for a new trial. Smith timely appeals the district court's denial of his motion for judgment as a matter of law and his motion for new trial.

We have jurisdiction over Smith's appeal pursuant to 28 U.S.C. § 1291 and affirm.

I

Woodruff Printing, Inc. ("Woodruff Printing") was incorporated in 1959 and throughout its incorporation was wholly owned by members of the

Woodruff family. Rex Woodruff owned controlling shares of Woodruff Printing and managed the corporation until some time in the 1990s. During 2002-2003, the time period at issue herein, Mark Woodruff, Rex Woodruff's son, was the president of Woodruff Printing.

Smith began working for Woodruff Printing in 1991, and he ultimately became the corporation's general manager. Smith left Woodruff Printing in 2000, but later was contacted by Rex and Mark Woodruff and asked to return. Smith went back to work for Woodruff Printing in January 2002. Mark Woodruff wanted Smith to return as accounting manager, but Smith insisted that he could only help Woodruff Printing if he were general manager and put in charge of overall operations. Mark Woodruff understood that upon Smith's return, all of Woodruff Printing's departments would report to Smith and Smith would be making most of the decisions in the operation areas. After Smith's return to Woodruff Printing in 2002, Smith was also Woodruff Printing's primary contact with the Internal Revenue Service ("IRS") for a system Smith set up to pay employment taxes electronically. Smith was aware from reviewing Woodruff Printing's records prior to his return that Woodruff Printing's financial situation was "bleak."

In June 2002, however, Smith sent a memorandum to Mark Woodruff in which he made projections that Woodruff Printing would have positive net income for 2002. Yet by July or August 2002, many of Woodruff Printing's suppliers began demanding

payment on delivery. As a result, Mark Woodruff developed priorities that favored making payments to two of Woodruff Printing's bank lenders, to Woodruff Printing's landlord, and to certain of the materials suppliers. In August 2002, an employee of Woodruff Printing's accounting department sent an e-mail to Smith and Mark Woodruff in which she detailed Woodruff Printing's unpaid tax liabilities, including sales taxes, state taxes, and federal employment taxes. According to the e-mail, there were then unpaid employment taxes for June and July in a total amount of $33,305.22. Despite this unpaid amount, no payments were made to the IRS during August 2002.

After Mark Woodruff received the e-mail, he held a meeting with the accounting department employee and Smith. Mark Woodruff testified that he came away from that meeting with the understanding that the accounting department "would continue to work on [the tax problem]." Later in the fall of 2002, however, Mark Woodruff found delinquency notices from the IRS in the accounting department. In late October 2002, Mark Woodruff sent an e-mail to Smith asking Smith to prepare and provide a schedule of payments to be made for the next two months for all Woodruff Printing's accounts payable. In that e-mail, Mark Woodruff pointed out that Woodruff Printing had paid tax penalties for being late on taxes, and that taxes should always be kept current.

At some point near the end of 2002, Mark Woodruff informed other Woodruff family members about Woodruff Printing's tax problem. It was

determined that Mark Woodruff would monitor Woodruff Printing's payments to creditors more closely, and it was agreed that Smith should limit his check writing to amounts less than $5000. Mark Woodruff testified, however, that he never limited Smith's authority to pay employment taxes via electronic transfers. The United States also introduced evidence at trial that Smith continued to write checks to Woodruff Printing's creditors in amounts larger than $5000.

Mark Woodruff's testimony was inconsistent, at best. He testified that in 2002 and 2003, the standard operating procedure was for Smith to discuss with him the cash flow problem and the priorities for determining what should be paid. He later testified that in 2002, he and Smith discussed how to handle the taxes, and that his strategy then was to "keep the presses rolling." He also testified that in 2003, he made the final decision as to which creditors should be paid, and that he was the one who decided to pay or to not pay taxes in 2003. In sum, his testimony at trial alternated between stating that he and Smith discussed which bills to pay, and stating that he decided which bills to pay.

It is undisputed that Smith was aware throughout the latter part of 2002, and all of 2003 until Woodruff Printing ceased operations, that Woodruff Printing's federal employment taxes were not being paid. At one point Smith advised Mark Woodruff to not pay bank loans and to pay the IRS, but Smith testified he did not pay the payroll taxes because in

July 2002 Mark Woodruff told Smith to defer paying the payroll taxes in order to keep the business operating by paying suppliers. During the period in question, there were insufficient funds available to pay all creditors and also pay all taxes. Smith testified that he reported to Mark Woodruff, got payment priorities from Mark Woodruff, and did not have authority to override Mark Woodruff.

Woodruff Printing's bookkeeper testified in support of Smith. She stated that during 2002, Mark Woodruff's creditor payment priorities were to first pay two bank loans, and then to pay vendors. She also testified that Mark Woodruff had the final decision-making authority in Woodruff Printing, and that in meetings during 2002, Mark Woodruff had the final say as to which creditors would be paid. She further testified that in August 2002, she had a discussion with Smith about how much was owed to the IRS for payroll taxes, and she testified that she discussed the tax problem with Mark Woodruff three or four times in 2002. Finally, she testified that Rex and Mark Woodruff had ultimate authority over the management and finances of Woodruff Printing.

Drew Elkins, a former employee of Woodruff Printing, offered to purchase Woodruff Printing in March 2003, but his offer was rejected by Rex and Mark Woodruff. Elkins testified that Smith handled most operational problems, but that Mark Woodruff had the final word as the "owner" of Woodruff Printing. Elkins also testified that "on a couple of occasions" Smith had generated checks "for a tax deal"

and given them to Mark Woodruff to sign, but that Mark Woodruff refused. Elkins testified, however, that he did not know that employment taxes were set up by Woodruff Printing to be paid electronically throughout 2002-03.

Woodruff Printing eventually ceased operations in 2003. The IRS made assessments against Smith pursuant to 26 U.S.C. § 6672, after making a determination that Smith was a person responsible for withholding, accounting for, and paying taxes withheld from the wages of the employees of Woodruff Printing for the last two quarters of 2002 and the first three quarters of 2003, who willfully failed to do so. The total assessments made against Smith were $279,353. Smith paid a portion of the assessment and then filed suit, seeking refund of that amount. The United States counterclaimed for amounts still owed.[1]

II

A. Judgment as a Matter of Law

Smith timely moved for judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50,

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[1] According to the United States' brief, at the time the United States counterclaimed against Smith for amounts owed under its assessment, the IRS also asserted a claim in Smith's third-party action against Mark Woodruff for unpaid amounts assessed under § 6672. The district court entered a stipulated judgment against Mark Woodruff for $324,732, and he was dismissed from the action. Appellee Br. at 3 n.2.

Aplt.App. at 378-84, and on appeal he continues to assert that he is "entitled to judgment on the facts" on the issue of "responsibility." Aplt. Br. at 17-18.

We review de novo the district court's denial of Smith's motion for judgment as a matter of law under Rule 50 of the Federal Rules of Civil Procedure. *Loughridge v. Chiles Power Supply Co.*, 431 F.3d 1268, 1280 (10th Cir. 2005). We make all reasonable inferences in favor of the non-moving party. *Id.* Both before the district court and on appeal, "[j]udgment as a matter of law is appropriate only if the evidence points but one way and is susceptible to no reasonable inferences which may support the nonmoving party's position." *Id.* (internal quotations omitted). This is a difficult and high standard for the movant to satisfy.

Under 26 U.S.C. §§ 3102(a) and 3402(a), employers are required to withhold federal social security and income taxes from wages paid to employees, and to remit those withheld amounts to the IRS on a regular basis. If an employer withholds these payroll taxes (also known as "trust-fund taxes"), but fails to pay them over to the government, the employee is nevertheless credited with having paid the taxes, and the government may not require any additional payment from the employee. *Slodov v. United States*, 436 U.S. 238, 243 (1978).

The IRS may then effect payment of the withheld taxes from the employer, via 26 U.S.C. § 6672. *Id.* at 244-45 ("[T]he officers or employees of the employer

responsible for effectuating the collection and payment of trust-fund taxes who willfully fail to do so are made personally liable to a 'penalty' equal to the amount of the delinquent taxes."); *see also Taylor v. I.R.S.*, 69 F.3d 411, 413 (10th Cir. 1995) ("When an officer or employee of a corporation fails to remit withheld taxes to the government, he may be subject, inter alia, to the penalty provisions of 26 U.S.C. § 6672.").

Section 6672 of the Internal Revenue Code provides:

> Any person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by the law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over.

26 U.S.C. § 6672(a). "Specifically, the penalty under § 6672 can be assessed against any officer or employee of a corporation who: (1) is under a duty to 'collect, truthfully account for, and pay over any tax imposed by this title' – i.e., a 'responsible person'; and (2) 'willfully fails' to do so." *Taylor*, 69 F.3d at 413 (quoting 26 U.S.C. § 6672). Smith challenges the jury's determination that he was a "responsible person"; the "willfulness" prong is not challenged in his appeal of the

denial of his motion for judgment as a matter of law. *See* Aplt. Br. at 16-19.

Section 6671(b) defines "person" as "an officer or employee of a corporation, or a member or employee of a partnership, who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs." 26 U.S.C. § 6671(b). The term "responsible person" has been widely discussed:

> Courts have generally given broad interpretation to the term 'responsible person' under section 6672. A person is responsible within the meaning of the statute if that person is required to collect, truthfully account for or pay over any taxes withheld from the wages of a company's employees. The responsible person generally is, but need not be, a managing officer or employee, and there may be more than one responsible person. Indicia of responsibility include the holding of corporate office, control over financial affairs, the authority to disburse corporate funds, stock ownership, and the ability to hire and fire employees. Among other things, therefore, a corporate officer or employee is responsible if he or she has significant, though not necessarily exclusive, authority in the general management and fiscal decision-making of the corporation.

Denbo v. United States, 988 F.2d 1029, 1032 (10th Cir. 1993) (internal quotations and citations omitted); *see*

also Bradshaw v. United States, 83 F.3d 1175, 1178-79 (10th Cir. 1995) (reciting same standards).

The evidence at trial showed that Smith was the general manager of Woodruff Printing during 2002 and 2003. Smith came back to Woodruff Printing in 2002, insisting that he be placed in charge of "overall operations." Smith had the responsibility to oversee the finance and accounting functions at Woodruff Printing during the 2002-03 period. During 2002, Smith had the independent authority to draw checks on Woodruff Printing's bank accounts. Although there was testimony that Smith's check writing authority was limited in 2003 to $5000, the IRS introduced evidence at trial that Smith wrote a substantial number of checks in 2003 that were for amounts larger than $5000. There was also testimony that Mark Woodruff never limited Smith's authority to electronically pay the payroll taxes.

Smith argues that he was simply doing what he was told by Mark Woodruff, and that he had no power over creditor priority at Woodruff Printing. However, it is clear that: (1) Smith was aware during the quarters at issue in 2002 and 2003 that Woodruff Printing's payroll taxes were not being paid; and (2) Smith paid other creditors rather than paying the payroll taxes. In addition, although Mark Woodruff and Smith had regular meetings discussing creditor priorities, Mark Woodruff also testified that he did not limit Smith's authority to make electronic funds transfers for payment of payroll taxes at any time during 2002 or 2003. And, Mark Woodruff sent an

e-mail to Smith in October 2002 stating that taxes should always be kept current.

The fact that Mark Woodruff had *more* control over creditor payment than Smith is not determinative; "significant" control is all that is required. *See Denbo,* 988 F.2d at 1033 ("However, while it is clear that Allred exercised greater control over the corporation than Denbo, section 6672 does not confine liability for the unpaid taxes only to the single officer with the greatest or the closest control or authority over corporate affairs. It suffices that Denbo had significant, as opposed to absolute, control of the corporation's finances." (internal quotations omitted)); *see also Taylor,* 69 F.3d at 416 ("If an individual possesses sufficient indicia of responsibility, he is a 'responsible person' under § 6672 regardless whether he: (1) has the final say as to which creditors should be paid; or (2) has the specific job within the corporate structure to see that the taxes are paid over to the government. The crucial inquiry is whether the person had the 'effective power' to pay the taxes – that is, whether he had the actual authority or ability, in view of his status within the corporation, to pay the taxes owed. Liability under § 6672 extends to all responsible corporate officers or employees, not just to the single 'most' responsible individual." (internal quotations and citations omitted)).

Smith relies on *Vinick v. United States,* 205 F.3d 1 (1st Cir. 2000), in support of his argument that the facts established at trial do not show that he was a "responsible person." In *Vinick,* the First Circuit

stated the "central question in determining whether a taxpayer is a responsible person" is "whether [the taxpayer] had the power to pay the taxes during the quarters in question." *Id.* at 10. The First Circuit found: (1) that the taxpayer had not exercised any decision-making authority over which creditors were paid; (2) that another individual was "in charge of the day-to-day operations"; (3) that merely because the taxpayer had the title of "corporate treasurer," because the substance of his work involved no authority over finances, the titular authority was not heavily relevant; and (4) that the taxpayer having check-signing authority was only relevant if the taxpayer was in a position to exercise his authority (e.g., did the taxpayer have access to the checkbook?). *Id.* at 12-13.

The First Circuit repeatedly noted in *Vinick* that the central question was whether the taxpayer had routine involvement in the day-to-day management such that the taxpayer had control over daily operations. *Id.* at 14. The *Vinick* court concluded: "Absent a finding that [the taxpayer] possessed actual, exercised authority over the company's financial matters, including the duty and power to determine which creditors to pay, as a matter of law he cannot be a responsible person." *Id.* at 15.

Contrary to Smith's assertion, the *Vinick* case does not support his argument that he is not a "responsible person." Unlike the taxpayer's involvement in the company in *Vinick*, Smith did have day-to-day involvement of Woodruff Printing. Smith was

the general manager; throughout 2002 and 2003 he wrote checks to pay Woodruff Printing's accounts payable. Smith met "routinely" with Mark Woodruff about the payroll tax liability. It is true that there is conflicting testimony about how much "power" Smith had over creditor priority. However, the standard is whether Smith "had the 'effective power' to pay the taxes – that is, whether he had the actual authority or ability, in view of his status within the corporation, to pay the taxes owed." *Taylor,* 69 F.3d at 416. It is undisputed that Smith's authority to make the electronic payments of the payroll taxes was never limited, and Mark Woodruff directed Smith at one point to keep the taxes current. To be a "responsible person," Smith need not have had exclusive control over the payments made to the accounts payable of Woodruff Printing.

Although the result here appears harsh, the statute at issue, and the line of cases from our circuit interpreting that statute, require us to affirm the district court's denial of Smith's motion for judgment as a matter of law. This is especially true considering the standard of review by which we are bound. *See Loughridge,* 431 F.3d at 1280 (stating that upon review of a motion for judgment as a matter of law, the reviewing court must make all reasonable inferences in favor of the non-moving party and that "[j]udgment as a matter of law is appropriate only if the evidence points but one way and is susceptible to no reasonable inferences which may support the nonmoving party's position").

Although it is a close case, considering the fact that some of the "traditional" indicia of responsibility are missing – Smith was not a stockholder in Woodruff Printing and it was a disputed fact whether Smith had authority to hire/fire – the indicia are merely factors to be considered amongst the totality of circumstances. In *Denbo* we emphasized that courts, including our court, have generally given a *broad* interpretation to the term "responsible person" for purposes of § 6672 liability and *Denbo* states that the "responsible person" generally satisfies the listed indicia, but need not in every case. Given our scope of review, we cannot conclude the district court erred in denying Smith's motion for judgment as a matter of law. When referencing the relevant indicia of a "responsible person," we cannot say the jury's verdict was against the great weight of all the evidence.

B. Motion for a New Trial Based on Jury Instructions

After the jury verdict against him, Smith moved for a new trial pursuant to Federal Rule of Civil Procedure 59, on the basis that the jury instructions given by the district court were in error. *See* Aplt. App. at 102-07 (district court order denying Smith's motion for a new trial). In reviewing challenges to jury instructions, this court must determine whether the jury instructions viewed as a whole "properly stated the applicable law and directed the jury to consider matters within its province." *Gardetto v. Mason*, 100 F.3d 803, 816 (10th Cir. 1996). "A district

court's decision to give a particular jury instruction is reviewed for abuse of discretion; ultimately, however, we apply a de novo standard of review to determine the propriety of an individual jury instruction to which objection was made at time of trial." *Reed v. Landstar Ligon, Inc.*, 314 F.3d 447, 454 (10th Cir. 2002) (internal quotations omitted).

Smith makes multiple challenges to the jury instructions, alleging that: (1) the district court's jury instruction number 20 misstated the law defining "responsible person"; (2) the district court's jury instruction number 21A misstated the law regarding orders from a superior; (3) the district court erred by failing to give Smith's proposed instructions regarding infusing capital into the corporation, closely-held corporations, and a reasonable cause defense; and (4) the alleged errors in totality constituted cumulative error.

1. Jury Instruction Number 20 ("Responsible Person" Defined)

Smith contends that the district court's jury instruction number 20 failed to accurately state the law defining "responsible person." Jury instruction number 20 stated, in pertinent part:

> The term 'responsible person' includes any person who is connected or associated with the corporation-employer in such a manner that he has the power to see that the taxes are paid, or the power to make

> significant decisions concerning the corporation, or determines that creditors are to be paid and when they are to be paid.
>
> Determining who is a responsible person is fact specific. The facts of each corporation-employer may and frequently do vary.
>
> The term 'responsible person' may include corporate officers, employees, or members of the board of directors. But not every corporate officer, employee, or board member is necessarily a responsible party. The meaning of the term is very broad and is not limited to the person who actually prepares the payroll checks or the tax returns. The 'responsible person' need not even be authorized to draw checks for the corporation so long as the person has the power to decide who will get such checks. In other words, the 'responsible person' is any person who can effectively control the finances, or determine the bills that should or should not be paid.

Aplt. App. at 83.

Smith argues that the first sentence – "The term 'responsible person' includes any person who is connected or associated with the corporation-employer . . . [who] determines that creditors are to be paid" – should have used the word "which" in place of the word "that" to state "[who] determines *which* creditors are to be paid" rather than "[who] determines *that* creditors are to be paid" as stated in the instruction given. Smith also argues that the instruction incorrectly implied that check-writing authority was

an indicia for responsibility because it stated: "In other words, the responsible person is any person who can effectively control the finances, or determine that bills should or should not be paid."[2] Smith contends these errors amount to a misstatement of the law defining the phrase "responsible person."

Smith's arguments are not persuasive. The determination "that" a creditor should be paid necessarily requires a determination "which" creditor should be paid. In addition, the instruction correctly informs the jury that the definition is fact-intensive, tells the jury that the "responsible person" will have "the power to decide *who* will get such checks," and informs the jury that the "responsible person" is "any person who can . . . determine the bills that should or should not be paid." *See Taylor,* 69 F.3d at 416 ("If an

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[2] At oral argument, Smith's counsel argued that the last line of the last paragraph of the instruction should have been stated in the conjunctive rather than in the disjunctive form (*i.e.*, "the 'responsible person' is any person who can effectively control the finances, *and* determine the bills that should or should not be paid" rather than "the 'responsible person' is any person who can effectively control the finances, *or* determine the bills that should or should not be paid"). Smith, however, did not raise this issue in his opening brief, and therefore we will not consider it herein. *See Bronson v. Swensen,* 500 F.3d 1099, 1107 (10th Cir. 2007) ("[W]e routinely have declined to consider arguments that are not raised, or are inadequately presented, in an appellant's opening brief."). In his opening brief, Smith focused on the first paragraph of the instruction when arguing instruction number 20 erroneously used the disjunctive when describing who qualifies as a "responsible person." Aplt. Br. at 22.

individual possesses sufficient indicia of responsibility, he is a 'responsible person' under § 6672 regardless whether he: (1) has the final say as to which creditors should be paid; or (2) has the specific job within the corporate structure to see that the taxes are paid over to the government. The crucial inquiry is whether the person had the 'effective power' to pay the taxes – that is, whether he had the actual authority or ability, in view of his status within the corporation, to pay the taxes owed." (internal citations omitted)).

Reading the instruction in its entirety, the instruction makes clear that it is not mere check-writing authority that determines whether an individual is a "responsible person," but that the "responsible person" must have a higher degree of control over the corporation's finances. *See Denbo,* 988 F.2d at 1032 ("Indicia of responsibility include the holding of corporate office, control over financial affairs, the authority to disburse corporate funds, stock ownership, and the ability to hire and fire employees. Among other things, therefore, a corporate officer or employee is responsible if he or she has significant, though not necessarily exclusive, authority in the general management and fiscal decisionmaking of the corporation." (internal quotation omitted)). The jury instruction "properly stated the applicable law." *Gardetto,* 100 F.3d at 816.

Furthermore, our review is to determine whether, *taken as a whole,* the jury instructions accurately state the governing law. *Id.* Any ambiguity left by

jury instruction number 20 is immediately rectified by jury instruction number 21, which stated:

> A corporate officer or employee is a responsible person if he or she has significant, though not necessarily exclusive, authority in the general management and fiscal decision-making of the corporation.
>
> Whether a person is a responsible person must be decided by the unique facts of each case. Indicia of responsibility include the holding of corporate office, control over financial affairs, the authority to disburse corporate funds, and the ability to hire and fire employees. If an individual possesses sufficient indicia of responsibility, he or she is a responsible person under the law regardless of whether he or she has the final say as to which creditors should be paid or has the specific job within the corporate structure to see that the taxes are paid over to the government. The crucial inquiry is whether the person had the effective power to pay the taxes – that is whether he or she had the actual authority or ability, in view of his or her status within the corporation, to pay the taxes owed.

Aplt. App. at 84. Jury instruction 21, which is not challenged by Smith on appeal, reinforces the point made to the jury in instruction number 20: the factual finding that an individual is a "responsible person" is fact-intensive and based on the unique facts of each case. Jury instruction 21 also reinforces the

ultimate question: whether Smith "had the effective authority to pay the taxes – that is whether he . . . had the actual authority or ability, in view of his . . . status within the corporation, to pay the taxes owed." *Id.* The jury instructions, as a whole, properly stated the overarching law on the question of who qualifies as a "responsible person."

2. Jury Instruction Number 21A (Orders of a Superior)

Smith contends that the district court's jury instruction number 21A failed to accurately state the law regarding orders from a superior. Jury instruction number 21A states: "The orders of a superior to prefer other creditors over the United States does not relieve a corporate officer or employee of liability as a responsible pa y." Aplt. App. at 85.

Smith contends there are three problems with instruction number 21A: (1) the instruction is "unduly suggestive" because it suggests that a person is a "responsible person" because he follows the orders of a superior; (2) the instruction is a misapplication of *Jay v. United States,* 865 F.2d 1175 (10th Cir. 1989); and (3) the instruction is a misapplication of *Salzillo v. United States,* 66 Fed. Cl. 23 (2005), a case which Smith argues should be followed by this court.

Regarding Smith's first challenge to instruction number 21A, the instruction does not suggest that a person is a "responsible person" because he follows orders of a superior. The instruction merely states that

following orders does not relieve an individual from being held liable as a "responsible person."

Smith's second challenge to instruction number 21A is a closer question, but ultimately fares no better. Smith contends that *Jay* downplayed the materiality of check-writing authority when that check-writing authority was subject to a superior's restrictions. *Jay* involved a taxpayer who worked as a bookkeeper for a company that did not pay its withholding taxes. 865 F.2d at 1176. The taxpayer, Jay, "was aware of policy decisions by the corporation's executives, signed corporate checks and paid bills to creditors from the corporation's bank account, which included funds withheld from employees' wages." *Id.* But Jay acted according to the instructions from his boss, Helmuth, as to which major bills to pay. *Id.* Helmuth testified that he decided whether to prefer other creditors to the United States. *Id.* at 1177.

When read in context, our ruling in *Jay* was not that check-writing authority subject to a superior's restrictions was not material, but rather that there were unresolved issues of material fact concerning the extent of Jay's authority over corporate decision-making. *Id.* at 1179. The district court had granted summary judgment against Jay, concluding he was a "responsible person" under § 6672. *Id.* at 1176. On appeal Jay contended he was not a "responsible person." *Id.* at 1177. We reversed the district court, concluding that "This is not a case where the taxpayer *necessarily* possessed authority to pay all bills . . . ; nor did Jay receive generalized instructions on

priorities. . . . Here, the president and general manager of the corporation specifically told Jay to pay other creditors, not the United States." *Id.* at 1179 (citations omitted) (emphasis added). We refused to conclude as a matter of law, however, that Jay was *not* liable: "We do not hold that Jay is absolved of liability." *Id.* Instead, we remanded the case for a trial on the merits so that a jury could decide whether Jay was a "responsible person" under § 6672, concluding issues of material fact remained for resolution by a jury.

Therefore, *Jay* stands for the proposition that signing checks at the direction of one's superior does not, standing alone, relieve one from being a "responsible person" for purposes of § 6672 but, rather, is merely a fact the jury should consider in the wide range of factors that determines whether an individual is a "responsible person" under § 6672. The district court's instruction in the present case did not misapply *Jay*. Additionally, Smith's involvement in Woodruff Printing was much greater than the taxpayer's involvement in *Jay*. Smith was the general manager, he oversaw day-to-day operations, he regularly met with Mark Woodruff regarding payment priorities, and he did more than "sign" checks – he was the IRS point-of-contact for the electronic payment of payroll taxes. The factual background in *Jay* and the facts presented here are greatly divergent.

Finally, Smith's third challenge to instruction number 21A also fails. Smith contends that we should follow the holding of *Salzillo*, a recent decision from

the Court of Federal Claims. *Salzillo* begins its analysis, however, by noting that "instructions from a superior not to pay taxes do not . . . take a person *otherwise responsible* under section 6672(a) out of that category." 66 Fed. Cl. at 33 (citing cases) (internal quotations omitted) (emphasis added). The question in *Salzillo* was whether the taxpayer was "otherwise responsible." *Id.* at 34. The court ultimately concluded that he was not, based heavily on the fact that the taxpayer had attempted to pay the company's payroll taxes to the IRS, but his efforts were detected, and overruled, and the money was prevented from being sent. The court stated:

> Accordingly, this is not a case in which a superior simply ordered an employee not to pay the IRS. Rather, here, [the superior] took steps not only to designate the creditors that would be paid, but also to ensure that others, including the IRS, would not be paid, thereby circumscribing [the taxpayer]'s ability to transfer corporate funds to the IRS in payment of [the company's] delinquent payroll taxes.

Id. The jury instruction given in the present case comports with both the holding in *Salzillo,* and our holding in *Jay:* the contrary orders of a superior are an insufficient basis for relieving an employee of liability as a "responsible person." The contrary orders of a superior are merely one factor, among many, to be considered when determining whether an individual

is a "responsible person."[3] The jury was not improperly instructed on the law, and there is no basis for a new trial based on this jury instruction. *Gardetto,* 100 F.3d at 816.

3. Smith's Proposed Instructions

Smith next contends that the district court erred in refusing to adopt certain of his proposed instructions. Smith proposed instructions regarding the effect of infusing capital into a corporation, the identity of Woodruff Printing as a closely-held corporation, and the reasonable cause defense. Aplt. App. at 1-6. None of these proposed instructions were adopted by the district court.

Regarding Smith's proposed instruction pertaining to infusion of capital into a corporation as an indicia of responsibility, Smith is correct that we have previously included the infusion of capital into a business as one factor which a jury could consider in determining whether an individual was "a person

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[3] To be sure, the *Salzillo* court also focused on the distinction between the "theoretical authority to effectuate such a payment" and the "effective ability to pay taxes over to the IRS." *Id.* at 35. This emphasis is not distinguishable from our cases which hold that the central factual inquiry is whether an individual had "effective power" to pay payroll taxes. *See, e.g., Taylor,* 69 F.3d at 416 (defining the standard as whether the taxpayer had the effective power to pay the taxes – that is, whether he had the actual authority or ability, in view of his status within the corporation, to pay the taxes owed). The jury was instructed on this standard in instruction number 20.

responsible for accounting for or paying over withholding taxes to the government." *Denbo,* 988 F.2d at 1033 (noting that the taxpayer "was responsible for infusing capital into the corporation, often pledging his own assets as collateral" and that the taxpayer's "financial involvement in the corporation, along with his check-signing authority, gave him the effective power to see to it that the taxes were paid"). Mark Woodruff testified that he was unaware of any loans that Smith ever made to Woodruff Printing, although Rex and Mark Woodruff made personal loans to Woodruff Printing during budget shortfalls. Although it is true that the infusion of capital, or lack thereof, is one factor the jury could have considered in making its factual determination of Smith as a "responsible person," the jury instructions, as a whole, properly stated the overarching law on the question of who qualifies as a "responsible person" based on the unique facts of each case.

The same analysis also applies regarding Smith's proposed closely-held corporation instruction. Smith requested a jury instruction that Woodruff Printing was a closely-held, family owned and operated business, and that the nature of the power structure within Woodruff Printing may have significantly influenced how managerial decisions were made at Woodruff Printing, as well as Smith's ability to counter the Woodruff family's decisions. As we have stated, the jury was adequately instructed that they were to consider the unique facts of the case to determine whether Smith was a "responsible person" under the

law. The jury instructions adequately defined this standard for the jury and an additional instruction identifying Woodruff Printing as a closely-held corporation was not required.

Finally, Smith challenges the district court's failure to instruct on the reasonable cause defense, which would address whether his actions were willful as required by § 6672. In *Finley v. United States,* 123 F.3d 1342, 1348 (10th Cir. 1997) (en banc), we recognized the "reasonable cause exception" to "excuse the failure to pay" payroll taxes held in trust for the government. We further held that the reasonable cause exception to § 6672 liability should be "narrowly construed." *Id.* We then concluded that "reasonable cause sufficient to excuse a responsible person's failure to pay withholding taxes should be limited to those circumstances where (1) the taxpayer has made reasonable efforts to protect the trust funds, but (2) those efforts have been frustrated by circumstances outside the taxpayer's control." *Id.* In *Finley,* we remanded the case for a new trial to provide the taxpayer an opportunity to present his defense.

The facts in *Finley* differed from those presented here. Under the facts in *Finley,* the taxpayer directed that the payroll taxes be paid, and by the time he found out his instruction had not been followed, there was no longer any money to pay them. Here, Smith knew the payroll taxes were overdue, knew that other creditors were being paid instead of the payroll taxes, and never took any direct action to pay the taxes. He discussed the payroll tax issue repeatedly with Mark

Woodruff throughout 2002-03, but never actually attempted to pay the taxes. According to the evidence presented, he was even directly instructed in one instance to keep the taxes current. The reasonable cause exception to § 6672 liability does not fit the facts of this case.[4]

Smith has not shown that the district court abused its discretion in refusing to give Smith's requested jury instructions. Viewing the jury instructions as a whole, the jury was properly instructed on the law relating to § 6672 liability.

4. Cumulative Error

As Smith has not prevailed in his challenge to instructions 20 and 21A and to the district court's failure to give Smith's requested instructions, there can be no cumulative error. *See McCue v. State of Kan., Dep't of Human Res.*, 165 F.3d 784, 791 (10th Cir. 1999) ("A cumulative-error analysis merely aggregates all the errors that individually have been

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[4] We again examined the reasonable cause exception in *Howell v. United States*, 164 F.3d 523 (10th Cir. 1998). In *Howell*, we held that a *fact issue remained* whether the taxpayer's conduct was willful, based, in part, on the fact that underwriters had seized control of the taxpayer's funds and directed payment of funds contrary to the taxpayer's usual practice of paying the payroll taxes from a "cushion account" that he had maintained. In the instant case, we do not have similar facts where the taxpayer has sent funds for payment of the payroll taxes, but then the actual payment was thwarted by the acts of others.

found to be harmless, and therefore not reversible, and it analyzes whether their cumulative effect on the outcome of the trial is such that collectively they can no longer be determined to be harmless." (internal quotation marks omitted)); *Getter v. Wal-Mart Stores, Inc.*, 66 F.3d 1119, 1125 (10th Cir. 1995) ("Cumulative-error analysis should evaluate only the effect of matters determined to be error, not the cumulative effect of non-errors.").

III

The judgment of the district court is AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

RICHARD A. SMITH, Plaintiff-Counter-Defendant-Appellant, v. UNITED STATES OF AMERICA, Defendant-Counter-Claimant-Appellee.	07-4210 (D.C. No. 2:05-CV-418-TS) (D. of Utah)

JUDGMENT

(Filed Feb. 17, 2009)

Before **HENRY**, **BRISCOE**, and **LUCERO**, Circuit Judges.

This case originated in the District of Utah and was argued by counsel.

The judgment of that court is affirmed.

Entered for the Court,

/s/ Elisabeth A. Shumaker
ELISABETH A. SHUMAKER, Clerk

IN THE UNITED STATES COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

RICHARD A. SMITH, Plaintiff, vs. UNITED STATES OF AMERICA, Defendant.	MEMORANDUM DECISION AND ORDER DENYING PLAINTIFF'S MOTION FOR A NEW TRIAL Case No. 2:05-CV-418 TS

The jury found that Plaintiff Richard Smith was a "responsible person" for collecting and paying over Woodruff Printing's employees' withheld income and social security taxes and that he willfully failed to do so. Plaintiff seeks a new trial alleging errors in the jury instructions.

Fed. R. Civ. P. 59(a) provides that: "A new trial may be granted to all or any of the parties on all or part of the issues . . . in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the Courts of the United States." "The party seeking to set aside a jury verdict must demonstrate trial errors which constitute prejudicial error."[1] Plaintiff contends that the Court made four errors in

[1] *White v. Conoco, Inc.*, 710 F.2d 1442, 1443 (10th Cir. 1983).

jury instructions. He contends that the Court erred by: (1) failing to give his Proposed Instruction No. 2 regarding loaning money to a corporation;[2] (2) failed to give his Proposed Instruction No. 6 regarding "mere" check writing authority; (3) erred in giving the Court's Instruction No. 20 because it was in the disjunctive,[3] and (4) that Instruction No. 20 conflicts with Instruction No. 21. The United States contends that the Instructions were proper and also contends that Plaintiff waived his objection to the purported conflict between Instructions Nos. 20 and 21 by failing to raise it during the jury instruction conference.

The Court finds no error in not giving the disputed portion of Plaintiff's Proposed Instruction No. 2. That disputed language would have added a non-exclusive list of factors of importance in defining "responsible person," including: "whether a person loaned money to the corporation from his personal funds." The Court declined to use this language as the elements were correctly stated in Instructions Nos. 20 and 21. Further, there was no evidence that Plaintiff made a loan to the corporation. It was Plaintiff's status as a responsible person that was at issue, not that of the person who lent money to the corporation. "Section 6672 does not confine liability for the unpaid taxes only to the single officer with the

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[2] Plaintiff's proposed jury instructions are filed at Docket No. 81.

[3] Docket No. 132, Jury Instructions.

greatest or the closest control or authority over corporate affairs.'"[4]

The Court finds no error in not giving Plaintiff's Proposed Instruction No. 6 regarding check-writing as the Instructions already accurately stated the law on this subject. The Court rejects Defendant's argument that Instruction No. 20 implied that "mere check writing authority" was a sufficient basis for finding a person was a responsible party.

The Court also rejects Plaintiff's argument that the first paragraph of Instruction No. 20 failed to state the power needed for responsibility in the conjunctive because that is contrary to the law.

Plaintiff also contends that the instructions are conflicting because the first sentence of Instruction No. 20 uses the disjunctive "or" and the first paragraph of Instruction No. 21 uses the conjunctive "and." The two sentences alleged to be conflicting are as follows:

> The term "responsible person" includes any person who is connected or associated with the corporation-employer in such a manner that he has the power to see that the taxes are paid, or the power to make decisions concerning the corporation, or determines

---

[4] *Denbo v. United States*, 988 F.2d 1029, 1033 (10th Cir. 1993) (quoting *Gephart v. United States*, 818 F.2d 469, 476 (6th Cir. 1987))

> that creditors are to be paid and when they are to be paid.[5]
>
> A corporate officer or employee is a responsible person if he or she has significant, though not necessarily exclusive, authority in the general management and fiscal decision-making of the corporation.[6]

There is no conflict in the instructions as Instruction No. 21 is merely an explanation of the circumstances in which a person may be a "responsible person."

Further, even if Plaintiff were correct in his assertion of a purported conflict, it would not entitle Plaintiff to a new trial for the following reasons. First, the Court agrees with the government that under Fed. R. Civ. P. 51, Plaintiff waived objection to this issue by not specifically objecting on the ground of a conflict in instructions. Plaintiff contends that there was a timely objection. However, Plaintiff's cite to his written or oral objections on another ground[7]

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[5] Instruction No. 20 (from 3B Kevin F. O'Malley, et al., *Federal Jury Practice and Instructions Civil* § 163.441 (5th ed. 2001)).

[6] Instruction No. 21 (quoting *Denbo*, 988 F.2d at 1032).

[7] Namely his argument that the first sentence of Instruction No. 20 is an incorrect statement of the law on the ground that it was not stated in the conjunctive. *See* Docket No. 86, at 5 (objecting to government's proposed instruction on grounds that test should be conjunctive) and Trans. at 7-8 (discussing Plaintiff's proposed modifications first sentence of

(Continued on following page)

does not support his argument that he objected on the ground of the purported conflict. Plaintiff also contends that he raised the issue earlier in his own proposed instructions and in his objections to Defendant's proposed instructions. However, the issue he raised earlier was his argument that Instruction No. 20 was a misstatement of law because it was not conjunctive,[8] not that there was a conflict between the first sentences of Instructions Nos. 20 and 21. This is not a sufficient objection because it did not inform the Court of Plaintiff's current position that the specific parts of the Instructions conflict and, therefore, Plaintiff did not meet the requirement of Rule 51(c)(1) that an objection to an instruction must state "distinctly the matter objected to and the grounds of the objection."[9]

Plaintiff contends that it is not fair for the government to be able to raise the waiver issue in its sur-reply. However, as the Plaintiff did not raise this purported conflict until his Reply brief,[10] there was no reason for the government to assert waiver before then.

Instruction No. 20, but not suggesting that it was inconsistent with first sentence of Instruction No. 21).

[8] *E.g.* Docket No. 86, Pl.'s Obj. to Def.'s Proposed Instructions, at 5.

[9] *See also Bitter v. A.O. Smith Corp.*, 400 F.3d 1227, 1241 (10th Cir. 2004) (applying Rule 51(c)(1) and finding objection not preserved for appeal because objection not properly specific).

[10] Docket No. 134, at 5.

The Court finds that both parts of the now-claimed conflicting instructions consist of language proposed by Plaintiff. The first sentence of Instruction No. 21 was proposed by Plaintiff in his Proposed Instruction No. 2.[11] The first sentence of Instruction No. 20 was included in the proposed modified version of Instruction No. 20 proffered by Plaintiff at the instruction conference. As explained in footnote seven, Plaintiff suggested modifying other parts of the sentence but in his proffered Modified No. 20 did not suggest modifying the sentence to change the use of the disjunctives or suggest that it conflicted with the first sentence of Instruction No. 21.

Because Plaintiff waived objection to the purported conflict, it could only be considered for "plain error."[12] "Plain error" is "patently plainly erroneous and prejudicial."[13] No prejudicial error occurred as a result of the Courts Instructions Nos. 20 and 21 because they accurately state the law and are not confusing.

For the foregoing reasons, it is therefore

ORDERED that Plaintiff's Motion for A New Trial (Docket No. 131) is DENIED.

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[11] Docket No. 81, at 2.

[12] Fed. R. Civ. P. 51(d)(2).

[13] *Giron v. Corrections Corp. of Am.*, 191 F.3d 1281, 1289 (10th Cir. 1999).

DATED August 28, 2007.

BY THE COURT:

/s/ Ted Stewart
TED STEWART
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

RICHARD A. SMITH, Plaintiff-Counter-Defendant-Appellant, v. UNITED STATES OF AMERICA, Defendant-Counter-Claimant-Appellee.	No. 07-4210

ORDER

(Filed Apr. 3, 2009)

Before **HENRY**, Chief Judge, **BRISCOE**, and **LUCERO**, Circuit Judges.

Appellant's petition for rehearing is denied.

Entered for the Court,

/s/ Elisabeth A. Shumaker
ELISABETH A. SHUMAKER, Clerk

IN THE UNITED STATES COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

RICHARD A. SMITH, Plaintiff, vs. UNITED STATES OF AMERICA, Defendant.	JURY INSTRUCTIONS Case No. 2:05-CV-418 TS

(Filed Jan. 9, 2007)

* * *

INSTRUCTION NO. 20

The term "responsible person" includes any person who is connected or associated with the corporation-employer in such a manner that he has the power to see that the taxes are paid, or the power to make significant decisions concerning the corporation, or determines that creditors are to be paid and when they are to be paid.

Determining who is a responsible person is fact specific. The facts of each corporation-employer may and frequently do vary.

The term "responsible person" may include corporate officers, employees, or members of the board of directors. But not every corporate officer, employee, or board member is necessarily a

responsible party. The meaning of the term is very broad and is not limited to the person who actually prepares the payroll checks or the tax returns. The "responsible person" need not even be authorized to draw checks for the corporation so long as the person has the power to decide who will get such checks. In other words, the "responsible person" is any person who can effectively control the finances, or determine that bills should or should not be paid.

If you find that Richard Smith was not a "responsible person," for any quarter at issue in this trial, then you will not consider any other issue for that quarter. On the other hand, if you conclude that Richard Smith was a "responsible person" for a particular quarter at issue in this trial, you must then decide whether he acted willfully in his failure to pay the withholding taxes to the government.

INSTRUCTION NO. 21

A corporate officer or employee is a responsible person if he or she has significant, though not necessarily exclusive, authority in the general management and fiscal decision-making of the corporation.

Whether a person is a responsible person must be decided by the unique facts of each case. Indicia of responsibility include the holding of corporate office, control over financial affairs, the authority to disburse corporate funds, and the ability to hire and

fire employees. If an individual possesses sufficient indicia of responsibility, he or she is a responsible person under the law regardless of whether he or she has the final say as to which creditors should be paid or has the specific job within the corporate structure to see that the taxes are paid over to the government. The crucial inquiry is whether the person had the effective power to pay the taxes – that is whether he or she had the actual authority or ability, in view of his or her status within the corporation, to pay the taxes owed.

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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

RICHARD A. SMITH, Plaintiff, vs. UNITED STATES OF AMERICA, Defendant.	Case No. 2:05-cv-00418-TS PLAINTIFF'S PROPOSED JURY INSTRUCTIONS The Honorable Ted Stewart Magistrate Jude Samuel Alba
UNITED STATES OF AMERICA, Counterclaim Plaintiff, vs. MARK WOODRUFF, Counterclaim Defendant.	

* * *

PROPOSED INSTRUCTION 2

A corporate officer or employee is a responsible person if he or she has significant, although not

necessarily exclusive, authority in the general management and fiscal decision making of the corporation. To be responsible, a person must have both significant general management and significant fiscal decision making authority.

Whether a person is a responsible person must be decided by the unique facts of each case. There is no exclusive list of factors which can be used to define the term "responsible person." However, factors of importance are whether: (1) a person held corporate office; (2) a person had independent authority to disperse corporate funds; (3) a person had independent authority to control financial affairs; (4) a person owned stock in the corporation; (5) a person had the ability to independently fire and hire employees; and, (6) whether a person loaned money to the corporation from his personal funds. The crucial question is whether the person had the power or actual authority to pay the taxes, in view of his status within the corporation.

Authorities:

Taylor v. I.R.S., 69 F.3d 411, 416 (10th Cir. 1995)

Denbo v. United States, 988 F.2d 1029, 1033 (10th Cir. 1993) (the Tenth Circuit relied upon the fact that an officer had loaned money to the corporation as an important factor in holding that he was a responsible person)

Sorenson v. United States, 521 F.2d 325, 327-28 (9th Cir. 1975)

Salzillo v. United States, 66 Fed.Cl. 23, 26 (2005) (the court used the term "independent" ability to hire and fire to ostensibly distinguish between apparent and actual authority in making its determination for responsibility)

United States v. Carrigan, 31 F.3d 130, 134 (3rd Cir. 1994) (the court used the term "independent" ability to hire and fire to ostensibly distinguish between apparent and actual authority in making its determination for responsibility)

(*Hammon v. United States*, 21 Cl.Ct. 14, 25 (1990) (the court used the term "independent" authority to disperse corporate funds to ostensibly distinguish between apparent and actual authority in making its determination for responsibility).

* * *

INSTRUCTION NO. 20

MODIFIED

The term "responsible person" includes any person who is connected or associated with the corporation-employer in such a manner that he has the power to see that the taxes are paid, or the power to make **significant** final decisions concerning the corporation, or determines **the priority of how** creditors are to be paid and when they are to be paid during the time when the payroll taxes accrued.

Determining who is a responsible person is fact specific. The facts of each corporation-employer may and frequently do vary.

The timing of a person's power within the corporation is important, because although a person may have had adequate power to see that the taxes were paid at some point in time, that power may have been revoked by another person within the corporation, or renounced by the person themselves.

The term "responsible person" may include corporate officers, employees, or members of the board of directors. **But not every corporate officer, employee, or board member is necessarily a responsible person.** The meaning of the term is very broad and is not limited to the person who actually prepares the payroll checks or the tax returns. **Indeed, a person who prepares payroll checks or tax returns is not necessarily a responsible person.** The "responsible person" need not even be

authorized to draw checks for the corporation so long as the person has the power to decide who will get such checks. **Therefore, a person who has been only authorized to write checks by a responsible person is not a responsible person themselves without further authority to act independently.** In other words, the "responsible person" is any person who controls the finances **to such an extent, that they have independent authority to see that the payroll taxes are paid**.

If you find that Richard Smith was not a "responsible person," for any quarter at issue in this trial, then you will not consider any other issue for that quarter. On the other hand, if you conclude that Richard Smith was a "responsible person" for a particular quarter at issue in this trial, you must then decide whether he acted willfully in his failure to pay the withholding taxes to the government.

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH
CENTRAL DIVISION

RICHARD A. SMITH,
Plaintiff,
vs.
UNITED STATES OF AMERICA,
Defendant.

Case No. 2:05-CV-418TS

BEFORE THE HONORABLE TED STEWART

January 2, 2007
Jury Trial
(Filed Feb. 20, 2008)

REPORTED BY: Patti Walker, CSR, RPR, CP
350 South Main Street, #146, Salt Lake City, Utah 84101

* * *

[7] that time?

A Painful.

Q Can you elaborate on that?

A There just wasn't enough money to go around.

Q So there wasn't enough money to go around. Who was the president of Woodruff Printing at this time?

A Mark Woodruff.

Q And did Mark Woodruff ever direct you to pay certain creditors over others?

A Yes.

Q Can you tell us about that, what happened?

A There were two accounts that needed to be paid, AIF and Zions Bank, they held notes to the equipment. One was an SBA loan and the other one was an equipment loan.

Q So what happened, how did Mark Woodruff treat these loans?

A They were first priority.

Q How much money was roughly owed to these on a monthly basis?

A I think between the two it was around 50,000 a month.

Q 50,000?

A I think so.

Q So were there any other priorities that Mark Woodruff had directed you to take care of?

A Some of the vendors.

[8] Q Vendors?

A Yes.

Q Like who would those be?

A Paper companies.

Q Paper companies?

A Ink bills.

Q What companies are the paper companies?

A Unisource was one.

Q Now I would like to turn your attention to the issue of the payroll taxes. Was there money to pay payroll taxes in 2002?

A Usually not.

Q Why not?

A There was more money going out than coming in.

Q And how much was the payroll roughly every two weeks?

A I don't remember.

Q Can you give an estimate as to how much it was?

A 40,000.

Q 40,000. That's every two weeks?

A Uh-huh. (Affirmative)

Q Now did you ever meet with Mark Woodruff to discuss payment of the payroll taxes in 2002?

A I am not sure if it was 2002 or 2003.

Q All right. Do you recall meeting with Richard Smith, Mark Woodruff and yourself in July of 2002?

* * *

[19] Q What is the basis of your knowledge as to why Richard Smith wanted to fire Brent Woodruff?

A Brent was expensive and not an asset to the company. Morale wise he did a lot of damage.

Q Do you know whether Richard Smith wanted to eliminate Rex Woodruff's salary?

A Yes, he did.

Q Do you know as bookkeeper how much Rex Woodruff was getting paid every year?

A I did, but I don't remember.

Q Would it refresh your memory if you took a look at a corporate tax return?

A Yes.

* * *

Q Does that refresh your memory?

[20] A Yes.

Q What is your recollection as to how much the company was paying Rex Woodruff?

A Around 80,000 a year.

Q Do you know whether Mr. Smith was allowed to eliminate Mr. Woodruff's salary?

A No, he wasn't.

Q Who made the decision to not eliminate Rex Woodruff's salary?

A The Woodruffs.

* * *

[74] after purchasing the company, the Woodruff family would no longer be involved. We would retain the name of the company for a period of time before changing that, but we calculated that we could pay off the debt and keep the company going just by eliminating the Woodruff family from the payroll and taking that amount of money and shifting it towards paying these bad debts.

Q So who specifically would be terminated?

A At the time we're looking at Rex, who was on the payroll of the company, Mark, Brent, another son, and Duane, who was another son. However, that still had not been decided because Duane was fulfilling a very good position in the company. He was in the prepress department, the electronic prepress department and, from all I could see, was doing a great job.

Q What was your impression of the other three that you mentioned in terms of their contribution to the company?

A We calculated that we could get by without them.

Q Is that a nice way of saying it?

[75] BY MR. WECKEL:

Q The cost savings, if you eliminated those salaries, how much would that be roughly?

A As I remember it was around $200,000 a year.

Q Did the Woodruffs accept your offer?

A No, they did not.

Q When did you make that offer, what year?

A 2004, March of 2004. Or was it 2003?

Q You said two years. Which year was it? Do you remember?

A It would have been 2003.

Q 2003. Okay.

Who was it specifically that rejected the offer?

A I got a letter from the family under Rex and Mark's signature.

* * *

[314] Stone, is that Mr. Smith's signature?

A No.

Q Mr. Woodruff, did you authorize anyone to sign Mr. Smith's name to these checks?

A No. I would have had the opportunity to sign them myself.

Q Do you recognize any of those signatures?

A No, because they are not made by the signators in their names, so I wouldn't be certain who signed those.

Q Were you aware of anybody who was signing Mr. Smith's name to checks?

A I wasn't aware that that was going on, but we did have the accounting department that was available to cut those checks, and so there was at least two individuals I knew of that could probably attempt to sign those checks.

Q Do you know if those individuals signed checks on Mr. Smith's behalf?

A I don't know specifically that they did, no.

* * *

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(2)

FILED
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No. 09-23

In the Supreme Court of the United States

RICHARD A. SMITH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly upheld a jury finding that petitioner was a person responsible for withholding, accounting for, and paying over trust fund taxes on behalf of a corporation under 26 U.S.C. 6672.

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In the Supreme Court of the United States

No. 09-23

RICHARD A. SMITH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-29) is reported at 555 F.3d 1158. The memorandum decision and order of the district court denying petitioner's motion for a new trial (Pet. App. 31-37) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet App. 30) was entered on February 17, 2009. A petition for rehearing was denied on April 3, 2009 (Pet. App. 38). The petition for a writ of certiorari was filed on June 30, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Employers are required to withhold Federal Insurance Contribution Act and federal income taxes from

their employees' wages and to remit the amounts withheld to the United States. 26 U.S.C. 3102(a), 3402(a). The withheld taxes constitute a special fund held in trust for the United States. 26 U.S.C. 7501(a); see *Slodov* v. *United States*, 436 U.S. 238, 243 (1978). If an employer withholds payroll taxes but fails to pay them over to the government, the government may collect the amount of unpaid tax from a "responsible person"—that is, "[a]ny person required to collect, truthfully account for, and pay over any tax" who "willfully fails" to do so. 26 U.S.C. 6672(a); see *Slodov*, 436 U.S. at 244-246 & n.7. A "person," for purposes of Section 6672(a), "includes an officer or employee" who "is under a duty to perform the act in respect of which the violation occurs." 26 U.S.C. 6671(b).

2. In 1991, petitioner began working for Woodruff Printing, Inc., a corporation owned by the Woodruff family, and became its general manager. Petitioner left the company in 2000. In January 2002, petitioner returned to Woodruff Printing as its general manager, after insisting that he be put in charge of overall operations. Pet. App. 2-3.

Upon his return to Woodruff Printing, petitioner became the corporation's contact with the Internal Revenue Service (IRS). Petitioner created a system to remit electronically the employment taxes that Woodruff Printing was required to withhold from employees' wages under Sections 3102(a) and 3402(a). Pet. App. 3. Petitioner was also given authority to write checks on Woodruff Printing's bank account. *Id.* at 5.

Petitioner was aware before he returned to Woodruff Printing that the corporation was experiencing financial difficulties. Pet. App. 3. By July or August 2002, some suppliers began demanding payment on delivery. In

response, Mark Woodruff, the company's president, prioritized payment to certain suppliers, as well as the corporation's bank lenders and its landlord. *Id.* at 3-4.

In August 2002, an employee in Woodruff Printing's accounting department informed Smith and the company's president, Mark Woodruff, that there were unpaid employment taxes for June and July. When Mark Woodruff learned that the payroll taxes were delinquent, he called a meeting with petitioner and the accounting department to discuss the problem. Later that year, upon discovering that the payroll taxes remained unpaid, Mark Woodruff instructed petitioner that tax payments should always be kept current. Pet. App. 4.

In late 2002, Mark Woodruff and his family decided that Woodruff Printing's payments to creditors should be monitored more closely. They also decided that petitioner should write checks only in amounts less than $5000. Pet. App. 4-5. Petitioner still occasionally wrote checks in larger amounts, however, and his authority to pay payroll taxes by electronic funds transfer was never limited. *Id.* at 5. Woodruff Printing ceased operations in 2003. *Ibid.*

3. The IRS made assessments against petitioner totaling $279,353 in unpaid payroll taxes for the last two quarters of 2002 and the first three quarters of 2003.[1] Petitioner paid a portion of the assessments and filed a claim for refund. After that claim was denied, he filed a refund suit in the United States District Court for the District of Utah. The government counterclaimed for the balance due. Pet. App. 7.

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[1] Assessments under Section 6672 were also made against Mark Woodruff, who did not contest his liability. The district court entered a stipulated judgment against him for $324,732. Pet. App. 7 n.1.

After presenting his case at trial, petitioner moved for judgment as a matter of law. The district court denied the motion. Pet. App. 2.

At the close of trial, the district court instructed the jury that a "responsible person," for purposes of Section 6672(a), "includes any person who is connected or associated with the corporation-employer in such a manner that he has the power to see that the taxes are paid, or the power to make significant decisions concerning the corporation, or determines that creditors are to be paid and when they are to be paid." Pet. App. 16-17, 39. In the same instruction, Jury Instruction No. 20, the court informed the jury that "[d]etermining who is a responsible person is fact specific," and that "the 'responsible person' is any person who can effectively control the finances, or determine the bills that should or should not be paid." *Id.* at 17, 39-40. In the following instruction, Jury Instruction No. 21, the court told the jury that "[a] corporate officer or employee is a responsible person if he or she has significant, though not necessarily exclusive, authority in the general management and fiscal decision-making of the corporation"; that "[w]hether a person is a responsible person must be decided by the unique facts of each case"; and that "[t]he crucial inquiry is whether the person had the effective power to pay the taxes." *Id.* at 20, 40-41.

The jury found petitioner liable for the unpaid payroll taxes under Section 6672(a). Pet. App. 2. Petitioner then moved for a new trial, arguing that the jury had been erroneously instructed. The district court denied the motion, finding no error in the jury instructions. *Id.* at 31-37.

4. The court of appeals affirmed. Pet. App. 1-29. The court first upheld the district court's denial of judg-

ment as a matter of law, concluding that the jury's finding that petitioner was a responsible person under Section 6672 was not "against the great weight of all the evidence." *Id.* at 15; see *id.* at 7-15. The court explained that, for purposes of Section 6672,

> [i]ndicia of responsibility include the holding of corporate office, control over financial affairs, the authority to disburse corporate funds, stock ownership, and the ability to hire and fire employees. Among other things, therefore, a corporate officer or employee is responsible if he or she has significant, though not necessarily exclusive, authority in the general management and fiscal decision-making of the corporation.

Id. at 10 (quoting *Denbo* v. *United States*, 988 F.2d 1029, 1032 (10th Cir. 1993)). The court noted that the evidence in this case showed that petitioner ran the business as general manager, wrote checks paying other creditors, had the unrestricted authority to pay the payroll taxes electronically, and had been instructed by Mark Woodruff to keep taxes current. *Id.* at 13-14. That evidence, the court concluded, was sufficient to support the jury's verdict. *Id.* at 15.

Petitioner argued that he could not be a "responsible person" because "he was simply doing what he was told by Mark Woodruff, and that he had no power over creditor priority at Woodruff Printing." Pet. App. 11. The court of appeals rejected that contention. The court noted that the evidence showed that Mark Woodruff had not limited petitioner's authority to pay payroll taxes, and in fact had instructed petitioner to keep taxes current. *Id.* at 11-12. The court further explained that "[t]he fact that Mark Woodruff had *more* control over

creditor payment than [petitioner] is not determinative; 'significant' control is all that is required." *Id.* at 12 (quoting *Denbo*, 988 F.2d at 1033). The court acknowledged that petitioner was not a stockholder and that his power to hire and fire was disputed at trial. *Id.* at 15. The court concluded, however, that those facts were "merely factors to be considered amongst the totality of circumstances," and were insufficient in themselves to demonstrate that petitioner was not a "responsible person" under Section 6672(a). *Ibid.*

The court of appeals also affirmed the denial of a new trial, rejecting petitioner's argument that the jury instructions given by the district court had misstated the law governing "responsible person" status under Section 6672(a). Pet. App. 15-28. The court held that Jury Instruction No. 20 had correctly informed the jury that "the definition is fact-intensive," and that "it is not mere check-writing authority that determines whether an individual is a 'responsible person,' but that the 'responsible person' must have a higher degree of control over the corporation's finances." *Id.* at 18-19. The court of appeals further concluded that any ambiguity on that point had been "immediately rectified" by Jury Instruction No. 21, which correctly stated that "[t]he crucial inquiry is whether the person had the effective power to pay the taxes." *Id.* at 20. The court of appeals also upheld the district court's refusal to instruct the jury that infusing capital into a business is an indicium of responsibility. *Id.* at 25-26. The court explained that the instructions given at petitioner's trial, taken "as a whole, properly stated the overarching law on the question of who qualifies as a 'responsible person' based on the unique facts of each case." *Id.* at 26.

ARGUMENT

1. Petitioner contends (Pet. 5-16) that the evidence at trial was insufficient as a matter of law to support a finding that he was a person responsible for withholding, accounting for, and paying over trust fund taxes on behalf of a corporation under 26 U.S.C. 6672. The court of appeals correctly rejected that contention, and its fact-bound conclusion does not conflict with any decision of this Court or the decisions of other courts of appeals. Further review is not warranted.[2]

a. As the court of appeals explained, an officer or employee is a "responsible person" under Section 6672 if the "totality of circumstances" demonstrate that the individual "had the effective authority to pay the taxes." Pet. App. 15, 21. In this case, the jury determined that petitioner was such a responsible person, and the court of appeals correctly held that the jury's finding was not "against the great weight of all the evidence." *Id.* at 15. The evidence showed that petitioner was Woodruff Printing's general manager, running its business on a day-to-day basis; that petitioner oversaw Woodruff Printing's finance and accounting functions; that, despite limits placed on his check-signing authority, petitioner signed checks on behalf of the corporation for amounts larger than $5000; and that petitioner's authority to pay federal taxes by means of electronic funds transfer was never

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[2] Although petitioner filed a motion for judgment as a matter of law at the conclusion of his case, he does not appear to have renewed that motion after the jury rendered its verdict. Under this Court's decision in *Unitherm Food Systems, Inc.* v. *Swift-Eckrich, Inc.*, 546 U.S. 394, 399-406 (2006), petitioner's challenge to the sufficiency of the evidence therefore was not properly before the court of appeals. The government did not argue in the Tenth Circuit, however, that *Unitherm* foreclosed petitioner's sufficiency challenge.

restricted. *Id.* at 11. Based on that evidence, the jury acted reasonably in concluding that petitioner was responsible for the payment of payroll taxes under Section 6672(a).

b. Petitioner contends (Pet. 5-16) that this Court's review is warranted because the decision below conflicts with decisions of other courts of appeals. That contention lacks merit.

Petitioner first argues (Pet. 5-9, 13) that the decision below implicates a conflict among the courts of appeals as to whether a "responsible person" must have the "*final word* as to what bills should or should not be paid and when," Pet. 5 (quoting *Caterino* v. *United States*, 794 F.2d 1, 5 (1st Cir. 1986), cert. denied, 480 U.S. 905 (1987)), or whether "significant financial authority" is sufficient, Pet. 7. But as petitioner appears to acknowledge (Pet. 6), the courts that have articulated what he calls the "final word doctrine" have made clear that "the word 'final'" in this context "means *significant* rather than exclusive control over the disbursement of funds." *Caterino*, 794 F.2d at 5 (emphasis added) (citations omitted); accord *Purcell* v. *United States*, 1 F.3d 932, 937 (9th Cir. 1993) ("[A]n individual may be said to have 'had the final word as to what bills should or should not be paid' if such individual had the authority required to exercise significant control over the corporation's financial affairs."). The decision below is consistent with that approach. See Pet. App. 12 ("'[S]ignificant' control is all that is required.").

Petitioner further contends (Pet. 8) that the courts of appeals have identified different indicia of responsibility, "creating a second, material split in the circuits." That argument also lacks merit. In each of the cases petitioner cites, the court of appeals made clear that the

determination whether a person has the "significant control" necessary to establish responsibility under Section 6672(a) depends on the "totality of the circumstances." *E.g.*, *Winter* v. *United States*, 196 F.3d 339, 345 (2d Cir. 1999). While the courts have identified various indicia of responsibility, they have not purported to assemble an exhaustive list. See *ibid.*; *Greenberg* v. *United States*, 46 F.3d 239, 243 (3d Cir. 1994); *Denbo* v. *United States*, 988 F.2d 1029, 1032 (10th Cir. 1993); see also *Taylor* v. *IRS*, 69 F.3d 411, 416 (10th Cir. 1995) ("In this circuit, we have set forth a non-exclusive list of factors demonstrating 'indicia of responsibility.'"). That the courts of appeals may have identified somewhat different indicia of responsibility in different cases thus does not mean, as petitioner suggests, that they have applied conflicting standards in evaluating responsibility under Section 6672(a).[3]

Finally, petitioner contends (Pet. 10-16) that the decision below conflicts with *Vinick* v. *United States*, 205 F.3d 1 (1st Cir. 2000), and *Godfrey* v. *United States*, 748 F.2d 1568 (Fed. Cir. 1984), because it "weighed status and involvement in day-to-day activities far more heavily" than the courts in those cases. Pet. 12. Petitioner is incorrect. In *Vinick*, the court concluded that the taxpayer—a corporation's accountant, shareholder, and nominally its treasurer—was not a responsible person under Section 6672 in part because he was not involved in day-to-day operations, lacked access to the corporate checkbook, and had no say in paying creditors. 205 F.3d at 11-12; see Pet. App. 12-14. Similarly in *Godfrey*, the

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[3] Petitioner's contention (Pet. 9) that the Sixth and Ninth Circuits do not "use the indicia standard at all" is incorrect. See *Gephart* v. *United States*, 818 F.2d 469, 473 (6th Cir. 1987); *United States* v. *Jones*, 33 F.3d 1137, 1139-1140 (9th Cir. 1994).

court held that a board chairman was not a responsible person because, *inter alia*, he was uninvolved in day-to-day fiscal matters, had no check-signing authority or control over payroll, and did not decide which creditors to pay. 748 F.2d at 1576. Petitioner thus identifies no conflict among the courts of appeals that would warrant this Court's intervention.

2. Petitioner also argues (Pet. 16-18) that the court of appeals erred in upholding the jury instructions in this case. That argument lacks merit.

Petitioner principally contends (Pet. 16-18) that Jury Instruction No. 20 placed undue emphasis on check-writing authority, and that the court of appeals erred in concluding that Jury Instruction No. 21 "fixed" that problem. As the court of appeals explained, however, Jury Instruction No. 20 "makes clear that it is not mere check-writing authority that determines whether an individual is a 'responsible person,' but that the 'responsible person' must have a higher degree of control over the corporation's finances." Pet. App. 19. Moreover, contrary to petitioner's contention (Pet. 18), the court of appeals held that Jury Instruction No. 20 "correctly inform[ed] the jury that the definition [of a responsible person] is fact-intensive," and that Jury Instruction No. 21 "reinforce[d] the point." Pet. App. 18, 20.

There is, in particular, no merit to petitioner's contention (Pet. 17) that the court of appeals' approach in this case conflicts with this Court's decision in *Estelle* v. *McGuire*, 502 U.S. 62 (1991). The Court in *Estelle* emphasized that an allegedly deficient jury instruction "'may not be judged in artificial isolation,' but must be considered in the context of the instructions as a whole and the trial record." *Id.* at 72 (quoting *Cupp* v. *Naughten*, 414 U.S. 141, 147 (1973)). Consistent with that prin-

ciple, the court of appeals emphasized that its task was "to determine whether, *taken as a whole*, the jury instructions accurately state the governing law." Pet. App. 19. Petitioner's factbound contention that the Tenth Circuit misapplied that standard to the instructions given in this case raises no legal issue of broad significance warranting this Court's review.

Petitioner also contends (Pet. 18) that the district court violated his due process rights by failing to charge the jury that the infusion of capital into a business is one of the indicia of responsibility under Section 6672. The court of appeals noted that the infusion of capital is a factor that may be considered by a jury, but correctly held that the charge "as a whole, properly stated the overarching law" of responsibility, "based on the unique facts of each case." Pet. App. 26.

Finally, petitioner contends (Pet. 18) that Jury Instruction No. 21 "clearly minimized the importance of having the final word over the payment of creditors in determining who had significant financial control over business operations." Petitioner did not, however, challenge Jury Instruction No. 21 in the court of appeals. See Pet. App. 20. This Court ordinarily declines to consider claims that were neither pressed nor passed on below, *e.g.*, *City of Springfield* v. *Kibbe*, 480 U.S. 257, 259 (1987), and there is no reason to depart from that practice in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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In The

Supreme Court of the United States

RICHARD A. SMITH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

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ARGUMENT

In citing to *Estelle v. McGuire*, 502 U.S. 62 (1991), the government contends that the jury instructions, taken as a whole, "raise no legal issue of broad significance." Br. Opp. 11. In so doing, the government implicitly claims that there was no harmless error associated with the jury instructions (despite admitting that the Tenth Circuit failed to instruct the jury as to a material fact adduced at trial, i.e., that the corporate president and majority shareholder each infused large sums of capital into the failing business by personally guaranteeing SBA loans, while the Petitioner did not). Br. Opp. 11. Harmless error analysis has been a part of *Estelle*'s application since the decision was rendered. *E.g.*, *United States v. Edmonds*, 80 F.3d 810, 823 (3rd Cir. 1996).

Because the Federal common law has considered a variety of indicia to determine liability under 26 U.S.C. § 6672, a totality of circumstances legal standard has been applied. *E.g.*, *Smith v. United States*, 555 F.3d at 1158, 1165 (10th Cir. 2009). There was no harmless error associated with *Smith*'s jury instructions only if they collectively did not mislead or confuse the jury. *Toth v. Grand Trunk R.R.*, 306 F.3d 335, 351 (6th Cir. 2002); *see Chapman v. California*, 386 U.S. 18, 23, 87 S.Ct. 824 (1967).

It is clear that the jury instructions misled the jury in a material way. It is axiomatic to say that fundamentally fair jury instructions require a jury to

apply material facts to a correct statement of the law. *See Estelle v. McGuire*, 502 U.S. 62, 72-75 (1991). However, in this instance, the instructions collectively not only failed to guide the jury as to why certain facts were material, e.g., on the infusion of capital issue, they also misstated the law as to the relevance of having the final say to determine which creditor should be paid and when.[1] Thus, *Smith* stands in conflict with the other federal courts as to whether the plain error standard should apply when a court arbitrarily fails to require a jury to consider material facts associated with liability.

The problem with *Smith*'s jury instructions is egregious. Indeed, the instructions, taken as whole, failed to inform the jury as to how these material facts adduced at trial were relevant for liability: (1) stock ownership (only Woodruff Family members were) (*Denbo v. United States*, 988 F.2d at 1029, 1032 (10th Cir. 1993); (2) directorship (only Woodruff family members and the bookkeeper were, while the Petitioner was not (*id.*); (3) the ability to sign tax returns (Mark Woodruff had this authority, while the Petitioner did not) (*id.*); and, (4) the infusion of capital into a failing business by persons who had a

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[1] Jury instruction No. 21 implied that this factor for liability was irrelevant. *Taylor v. International Revenue Service*, 69 F.3d 411, 415 (10th Cir. 1995) cites to other circuits by way of dictum in stating that the so called "final say" doctrine is not dispositive as to liability. However, *Taylor* never stated or implied that the "final say" doctrine was irrelevant in determining liability, as instruction No. 21 does.

financial stake in the businesses success.[2] *Denbo*, 988 F.2d at 1032; *Taylor*, 69 F.3d at 415. Additionally, all of the above indicia are ones which the Tenth Circuit has considered as relevant in the past for liability. Where as here, a totality of circumstances standard is used for jury instructions rather than a precise legal standard, failure to require the jury to consider material evidence on four, common law indicia is not only non-harmless error – it is perhaps even structural error. *See Neder v. United States*, 527 U.S. 1, 10, 119 S.Ct. 1827, 1834 (1999). Additionally, where as here, there is no defined national legal standard for liability, there is always a danger that the factors associated with liability will not only continue to evolve under the common law, but will be applied in an arbitrary or imprecise fashion.

Secondly, the disjunctive nature of instruction No. 20, i.e., liability occurs in one of three ways, one of which is the power to determine whether any creditor should be paid, is analogous to a special verdict interrogatory. That is, if the jury determined that the Petitioner wrote checks unilaterally in smaller amounts (which he did), then the jury was required to not consider the totality of the other material facts, and find the Petitioner liable per se.

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[2] The trial court also refused to provide the jury with the Petitioner's proposed instruction pertaining to how the power structure in a closely-held corporation works.

See E.E.O.C. v. Manville Sales Corp., 27 F.3d 1089, 1097 (5th Cir. 1994). Thus, the instructions could not have been considered as a whole by the jury. *Id.* Under this analysis, *Smith* presents a second, material split with the other circuits as to how the harmless error standard should be applied, because it requires liability through the use of a de facto special verdict interrogatory.

The government contends that other language in instruction No. 20 guided the jury to consider all of the material facts of the case. Br. Opp. 10. However, the government's response is cursory, and does not address the danger articulated in *Manville*, i.e. that a positive determination that the Petitioner had written smaller checks terminated the jury's inquiry as to the other material facts. *Id.* Therefore, the government's response is superficial.

Thirdly, there is some conflicting case law, albeit relatively minor, as to how the federal courts should apply the harmless error standard in a civil jury instruction context. A Ninth Circuit panel stated in 2000 that: (1) a less stringent review of civil jury instructions is required than for criminal instructions; (2) disputed facts should be resolved in favor of the losing party on appeal; and, (3) a more stringent review should be used than a sufficiency of the evidence standard. *Kennedy v. Southern California Edison Company*, 219 F.3d 988, 998 (9th Cir. 2000). *Kennedy* has not been followed by any other federal appellate court, nor has the Ninth Circuit explicitly overturned it. However, later Ninth Circuit panels

have held that jury instruction error warrants reversal only when it is more probable than not that a different result would have occurred if a correct instruction had been given. *E.g.*, *Head v. Glacier Northwest, Inc.*, 413 F.3d 1053, 1066 (9th Cir. 2005). Other minor variations exist in the federal appellate courts as to how to apply the plain error standard in a civil jury instruction context, e.g., *de novo* and abuse of discretion standards are both used. Nevertheless, a national standard for trust fund tax liability would eliminate this problem as well.

Lastly, the government contends that this Court should not consider the Petitioner's argument pertaining to jury instruction No. 21, pursuant to *City of Springfield v. Kibbe*, 480 U.S. 257, 259 (1987). Br. Opp. 11. However, *Kibbe* does not apply for the following reasons. In *Kibbe*, this Court did not consider a jury instruction issue because it had not been raised during the litigation, and because it lacked sufficient importance to the overall decision of the case. However, in this instance, the 10th Circuit relied heavily upon jury instruction No. 21 to hold that the instructions, taken as a whole, adequately presented the law to the jury. *Smith*, 555 F.3d at 1167. Thus, it is clear that consideration of jury instruction No. 21 has been raised, sua sponte, by the Tenth Circuit, and that it is central to the outcome of this case. Therefore, the government's argument regarding the relevance of *Kibbe* is misplaced.

CONCLUSION

The government's position that the jury instructions, taken as a whole, do not raise any issue of broad significance fails to consider the harmless error standard. *Smith*'s jury instructions stand as an example of how a court can arbitrarily choose which common law indicia to apply to find liability in the trust fund tax context without a national standard for liability. Thus, even assuming that the split in the federal courts regarding their varying use of indicia to determine liability is not large enough to warrant a grant of certiorari in and of itself, coupled with *Smith*'s disregard of *Chapman* in the civil jury instruction context, certiorari should be granted to address both of these serious problems.

RESPECTFULLY SUBMITTED this 10th day of September, 2009.

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